BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas	: :	WC Docket No. 06-172

REPLY COMMENTS OF FULL SERVICE NETWORK
IN OPPOSITION TO VERIZON'S PETITION FOR FORBEARANCE

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY

Full Service Network ("FSN") submits these Reply Comments[1] in opposition to the petition for forbearance in the Pittsburgh Metropolitan Statistical Area ("MSA") filed on September 6,2006 by the Verizon Telephone Companies ("Verizon").[2] FSN strongly opposes the grant of Verizon's petition because it would sound the death knoll for local landline competition and threaten the future ability of FSN to provide local telephone service to its 18,000 customers in Pennsylvania. When the Commission relieved Verizon of its obligation to provide UNE-P at reasonable rates, FSN was forced to seek an alternate way of servicing its customers. This alternate way relies on loops, which are critical delivery elements and are the very elements Verizon seeks to remove in its petition. There are no alternate providers of these elements and competitive local exchange carriers ("CLECs") like FSN cannot build these facilities. Granting Verizon's petition would harm competition, harm the interests of consumers and be contrary to the public interest. Verizon's petition must therefore be denied under Section 10 of the Communications Act of 1934, as amended.[3]

FSN is a Pennsylvania-based company serving the Pennsylvania market, primarily residential customers. Founded in 1989 as a long-distance telephone company, FSN eagerly jumped into the local telephone market in 1996 after passage of the Telecommunications Act of

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1 *See Wireline Competition Bureau Grunts Extension of Time to File Comments on Verizon's Petitions for Forbearance in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical* Areas, Public Notice, WC Docket No. 06-172, DA 07-277 (rel. Jan. 26,2007). FSN did not file initial comments.

2 *Petition of the Verizon Telephone Companies for Forbearance Pursuant* to *47 U.S.C. § 160(c) in the Pittsburgh Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6,2006). In addition to the Pittsburgh petition, Verizon filed five other petitions for the areas of Philadelphia, Boston, New York City, Providence and Virginia Beach, All six petitions have substantially the same structure and discuss substantially the same issues.

3 47 U.S.C. § 160.

1996 ("TA-96"). The road to entry into the local telephone market has been paved with endless battles - technical, financial and legal. The single biggest obstacle to FSN's entry into the local telephone market has been dealing with Verizon. Verizon controls access to the public switched telephone network ("PSTN") and access to potential customers through its "last-mile facilities" (i.e. loops). The simple fact is that Without cooperation from Verizon, FSN cannot interconnect its facilities with the PSTN nor can FSN reach potential customers through the facilities controlled by Verzion. In FSN's experience, Verizon does not voluntarily cooperate without the firm intervention of regulators. Verizon's promise to continue to make loops and transport accessible to CLECs if this petition is granted is meaningless if that "access" is overpriced and not subject to regulatory safeguards. Verizon's alternative to UNE-P, its so-called Wholesale Advantage product, is a primary example of what can happen when regulators choose to take Verizon at its word. In exchange for "access" to UNE-P, Verizon's Wholesale Advantage requires CLECs to forgo every other legal and reasonable right normally available.

Therefore, the Commission must deny Verizon's petition and must continue to require Verizon to make loops available to competitors in the markets at issue. The continued existence of intramodal competition requires this outcome. If, despite all the potential harm that may result from allowing forbearance, the Commission does decides to grant Verizon's petition, then FSN strongly urges the Commission to require that Verizon's alternate offerings of loops be subject to regulatory control. As suggested by the Pennsylvania Public Utility Commission ("PaPUC"), the Commission should clearly state that this regulatory control will be exercised by the state public utility commissions! This would be an appropriate choice because state commissions are already well-equipped to handle intercarrier disputes and have a long history of overseeing the proper implementation of federal directives. If the Commission contemplates

4 The Comment of the Pennsylvania Public Utility Commission, filed March 5,2007 at 18.

granting Verizon's petition, the only way to possibly ensure the future viability of landline telephone competition is by guaranteeing a transparent process with firm regulatory oversight. By its own actions with the UNE-P alternative, Wholesale Advantage, Verizon has shown that its business motivation is to price landline competitors out of the market, thus removing an essential source of local competition.

II. VERIZON'S PETITION MUST BE DENIED BECAUSE VERIZON IS THE DOMINANT PROVIDER OF THESE SERVICES AND GRANTING THE PETITION WILL END INTRAMODAL LOCAL LANDLINE TELEPHONE COMPETITION

Market power refers to the ability of a company to exert significant influence over the price for its product which allows the company to price its product above the level that would prevail under competition.[5] Market power is constrained where competitive alternatives exist that limit the company's ability to overprice its products, The theory is that, with competitors in the market, a company is not able to price its products unreasonably high because customers have the option of purchasing the same product from another company. In the context of this petition, the test for market power is whether the elements from which Verizon seeks forbearance (i.e. loops) are competitively available so as to justify the removal of current regulatory constraints (i.e. UNE pricing). To be granted relief, Verizon must prove that there are viable alternatives to loops such that the market constrains Verizon to offer those elements at reasonable prices.[6]

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5 *See* Glossary of Industrial Organization Economics and Competition Law, compiled by R. S. Khemani and D. M. Shapiro, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD, 1993 available at http://stats.oecd.org/glossary/index.htm.

6 47 U.S.C. § 160(b)("The Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.").

Instead of offering any proof on this issue, Verizon instead focuses on the availability of retail products to end-user customers.[7] This flawed analysis is a classic smoke and mirrors attempt by Verizon to divert the Commission away from the relevant analysis in this case. The reason Verizon does this is transparent - there is no competition at the wholesale level for loops. Without this competition, the Commission must deny Verizon's petition.

A. <u>Because CLECs cannot provide or purchase loops independent of Verizon, they will not be able to offer competitive landline services if Verizon's petition is granted.</u>

The loop facilities that Verizon wants to deregulate in this petition are part of the public switched network and were built in the late nineteenth century by "regulated monopolies" such as Verizon. As a regulated monopoly, Verizon was guaranteed a profit through the rates it could charge customers for services and was protected from any competitors coming into the market and building competing facilities. In exchange for this, Verizon had to build the public telephone network and comply with various regulatory requirements to safeguard consumers.

With the passage of TA-96, the goal of regulators shifted from protecting a regulated monopoly to opening up the public telephone network to competitors so that competition among local telephone companies would provide consumers with choices, keep prices low and enhance service quality and offerings. In recognition of the fact that Verizon, and other ILECs, control essential facilities, TA-96 recognized that true landline competition would only be viable if competitors were granted access to essential facilities at rates that encouraged investment. In this proceeding, Verizon is asking the Commission to remove regulated pricing requirements for

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[7] Many of the comments already filed in this docket express why, even if the Commission were to accept Verizon's point of analysis, VoIP and wireless offerings are not true substitutes for local landline competition. *See* <u>Opposition to Verizon's Petitions Filed on Behalf of Twenty-Two Competitive Carriers</u>, dated March 5,2007 at 28, 31-32; <u>Comments of the City of New York</u>, dated March 5,2007 at 3; <u>Sprint Nextel Corporation's Opposition to Petitions for Forbearance</u>, dated March 5,2007 at 16.

the most essential element - loops. The predictable result will be that Verizon overprices these elements to keep them out of reach from its competitors.

Without the ability to purchase these elements at reasonable rates, CLECs are without options because they cannot construct these elements themselves. Practically speaking, building a local telecommunications network is "extremely capital intensive" and cannot be done "on an economically justifiable basis."[8] This is because most communications equipment has no other use and cannot be reused for alternative purposes. Therefore, competitors willing to invest in the required network facilities and equipment must have a certain level of expected revenue from the use of those facilities or they will not make the investment. A group of investment firms that have invested several billions of dollars in competitive landline companies over the past twelve years has made clear in this proceeding that it will not invest in CLEC competitors if Verizon's petition is granted.[9] This means that even if a competitor were willing to absorb all the risks of building an alternative network, it would also have to have its own private source of funding because funds from investors would not be available.

For FSN, finding an alternate way of reaching potential customers would require an investment of billions of dollars, FSN offers the following as an illustration of the cost of what would be required on even the most simplistic "to do list" to replace the loops provided by Verizon. At the very basic level, the current wiring between an individual customer's location and the Central Office would need to be replaced. This would involve the following:

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8 Telecommunications - FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services, United States Government Accountability Office Report, GAO-07-80 at 26 (November 2006); Opposition of Cavalier Telephone Subsidiaries to Verizon's Petition for Forbearance, WC Docket No. 06-12, dated March 5,2007 at 18.

9 Telecom Investors Opposition to Verizon's Petition, dated March 5,2007 at 5.

1. A new Network Interface Device ("NID") would need to be mounted on the customer's house.
2. A trench would need to be dug in each yard out to the street.
3. Install cable in conduit in the trench.
4. Install cable onto the telephone pole.
5. Run cable along poles to the Central Office (this example presumes that FSN would still continue to have access to Verizon's Central Office and would not be required to build its own Central Office facilities.)

To determine a rough estimate of the cost of only the wire needed for this undertaking, an average distance to the Central Office of two miles is assumed. Further $0.18 per foot is used and is based on the cost of a box of wire that FSN currently utilizes in a consumer's home when he or she wants a new jack installed. This wire would not be the specialized cable that would be necessitated by the work proposed here. The *cost* of that wire would be significantly greater than what is used for purposes of this illustration. With these assumptions, FSN estimates that the *cost* for the wire alone to replace Verizon's loops would be approximately $1,900.80 for each customer. In terms of revenue from customers, FSN's most popular rate plan now costs $31.09 per customer per month. Thus, for FSN to recover the costs of the investment to provide just the wiring for one customer's location, that customer would need *to* remain a FSN's customer for approximately five years. If the customer chooses to discontinue service with FSN prior to the five years, then the facilities FSN built would become useless and cannot be recycled.

If FSN is required to incur this cost of wiring ($1,900.80) for its existing customer base of approximately 18,000 customers, the total cost of wifing alone would be $34 million.[10] This figure does not include any of the overhead that would be incurred by FSN nor does it include the costs of an expanded workforce that would be necessary to maintain these facilities. On a practical level, the overhead costs that FSN would encounter in undertaking this project include

10 Because FSN has customers throughout the Commonwealth, this amount is an underestimate as it does not take into consideration all the other factors that would be necessary to transition customers farther away from FSN's primary location in Pittsburgh.

the purchase of bucket trucks and ladders needed to reach the poles. The spools of wire required would be large and FSN currently has none of the trucks that would be needed to move around those spools. The cost of a bucket truck can range between $19,000 and $85,000 depending on size.[11] In terms of additional employees, FSN currently employees 65 people and would incur added expense in both pursuing new employees and compensating them. As an example of some of these costs, the cost to place a "help wanted" ad on monster.com costs $450.

In addition to these costs, other considerations would need to be addressed as a practical matter. For example, FSN does not have the required certification necessary to perform work up off the ground and FSN would presumably need *to* purchase insurance due to the hazardous nature of the work involved in locating these wire facilities. FSN also does not currently own any of the tools or testing equipment that would be necessary to ensure the safety and reliability of its newly installed products. Further, the poles upon which the wiring would be placed belong primarily to Verizon, thus, FSN would need *to* pay pole attachment rental fees to Verizon. In reality, a project of this scope would take a staff of thousands, round-the-clock planning, swift government action at all levels to include the granting of easements and implementation of eminent domain to take the customer's property for the purposes of installing the new facilities. Finally, the inconvenience to customers seeking to receive service from FSN cannot be understated. If required to build these new facilities each time a new customer wanted to receive service from FSN, then installation would now take weeks because the existing infrastructure would not be available to FSN.

Even if all of this were possible, the timeframe for completion of such a project would take well beyond the six-month transition timeframe allotted by the Commission in the Omaha Order. A six-month timeframe to complete a project to duplicate facilities that Verizon and other

11 *See* http:/lwww.nescosales.com.

regulated monopolies constructed over 150 years with the use of taxpayer money is simply not feasible. Even with advances in technology and the use of fiber, Verizon itself acknowledges that reconstructing the existing telephone network requires the investment of a significant amount of time, resources and manpower. Verizon has made public its intention to replace the 150 year old copper in each customer's location with fiber. In furtherance of this goal, Verizon has publicly indicated that it will spend about $20 billion by the end of the decade to reach 16 million homes from Florida to California.[12] Further, specifically in Pennsylvania, December 31, 2015 is the earliest time commitment Verizon would make for deploying broadband to 100% of its total retail access lines.[13] According to Verizon, it is "one of the world's leading providers of communications services," has a workforce of 242,000 employees, and for wireline alone it generates revenues of $50,729 million.[14] If Verizon, a company of this magnitude and resources, is publicly stating that deploying new facilities to each of its customers' homes will require the investment of billions of dollars over the next decade, it is patently unreasonable to assume that a much smaller company with far less resources could build the facilities that would be required if the Commission were to grant Verizon's petition.

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12 Ken Belson, *Verizon Is Rewiring New York, Block by Block, in a Race for Survival*, N.Y. Times, August 14,2006 at http://www.nytimes.com/2006/08/14/technology/14verizon.html?ex=1313208000&en=469743f49334baa6&ei=5088&partner=rssnyt&emc=rss.

13 *Petition for Amended Network Modernization Plan of Verizon Pennsylvania, Inc.*, Docket No. P-00930715F1000, Order entered May 20,2005 at 5. Copies of PaPUC orders can be found at http://www.puc.state.pa.us/general/search.aspx.

14 Verizon Communications Inc., US Securities and Exchange Commission, Form 10-K for the fiscal year ended December 31,2006 at 4 available at www.verizon.com.

B. Because Verizon is the only wholesale provider of these essential facilities, granting Verizon's petition for forbearance will give Verizon permission to rate the facilities in the way most advantageous to Verizon which will end local landline competition.

If Verizon's petition is granted, then expecting CLECs to build an alternate telecommunications network is unrealistic, as discussed above. Because of this, the next issue becomes whether other wholesale providers of these services exist to provide a competitive check on the rates that Verizon offers the facilities. As explained throughout the various comments filed already, Verizon is the only entity that can supply competitors the facilities necessary to interconnect with the PSTN and to reach customers.[15] Perhaps the most compelling testimony of this fact is found in the comments of Sprint Nextel: "As one of the nation's largest purchasers of wholesale services, Sprint Nextel knows that competitive alternatives to Verizon facilities are rare in these MSAs."[16] Beyond not having any wholesale competitive alternative to gain access to these essential facilities, Sprint Nextel notes that "[e]ven a large competitor like Sprint Nextel lacks leverage when dealing with an entrenched ILEC like Verizon."[17]

If Verizon's petition is granted, this will leave much smaller CLECs, like FSN, with no bargaining power when attempting to gain wholesale access from Verizon for loops. Because the true state of the local telephone market today creates a situation where local competitors can neither build their own facilities nor gain access to essential facilities from multiple sources,

15 See Opposition of Monmouth Telephone & Telegraph, Inc., WC Docket No. 06-172 dated March 5,2007 at 7; Comments of the City of New York dated March 5,2007 at 3 ("Competitive local fiber facilities are available but hardly ubiquitous...Commercial local fiber build-outs have not been comprehensive and leave market segments...critically dependent on Verizon's local loop.")

16 Sprint Nextel Corporation's Opposition to Petitions for Forbearance, dated March 5,2007 at 21.

17 Id. at 20.

Verizon's petition must be **denied.** To do anything **else** would ensure the demolition of local landline competition **once and** forever,

III. VERIZON'S PROMISE OF CONTINUING "ACCESS" TO LOOPS, EVEN IF ITS PETITION IS GRANTED, DOES NOT MEAN THE SERVICE OFFERINGS WILL BE TRULY AVAILABLE TO COMPETITORS

Verizon assures the Commission that CLECs will **continue** to have access to loops and if its petition is granted. However, the reality is **that such "access"** means **nothing** without affordability or, at a minimum, true alternatives. With Vcrizon pricing loops out of **the** reach ***of*** **competitors,** CLECs would be like **an** average person **wandering** around **a** BMW **dealership** dreaming **of** buying **a** car he **or she simply** cannot afford. Unlike CLECs, however, that **average** person **has** other options. For example, he or she can choose a lower-priced car or utilize public transportation. For **CLECs,** there **are no** lower priced cars nor are there any other alternatives. Without **access** to **loops and** transport at reasonable rates, CLECs will not be able to continue to provide local telephone service.

The Commission **cannot** grant Verizon's petition **based on Verizon's assurances that** it will make reasonable alternate **offerings.** In FSN's experience, Verizon does not have a history of honoring commitments **such as** this **and,** notably, in the context of this case Verizon offers no details as **to** how such **an** alternative **offering** would be structured. ***As*** **NASUCA succinctly** asks in its comments, **why** is forbearance necessary **at** all **if** Verizon truly **plans** to make **an** alternate offering available that **is** the **equivalent** of **what** is **provided** now?[18] The answer is, Verizon will not make a reasonable **offering** in the absence of its current obligations **and,** therefore, its petition must be denied.

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18 Comments of the National Association of **State** Utility **Consumer** Advocates, et. **al.,** dated March **5,2007 at** 19.

A. Verizon's "Wholesale Advantage" Offering in lieu of UNE-P is a clear example of how Verizon can hide behind "private contracts" to force competitors out of the market.

In March of 2005, the PaPUC announced its decision to not require Verizon to provision UNE-P.[19] For FSN and many CLECs who were providing telephone service by purchasing UNE-P from Verizon, the consequences of this decision were extremely damaging. In the wake of the decision, Verizon offered to make the components of UNE-P available to CLECs through its "Wholesale Advantage" offering. Similar to the current petition being considered by the Commission, Verizon relied on this alternate offering to show that CLECs would still have access to UNE-P but, in Verizon's opinion, at a more "reasonable" cost.

In fact, Wholesale Advantage would be more aptly named "Wholesale Disadvantage" based on its Draconian and patently inequitable terms. Regulators know very little about the true extent of this offering and the rights CLECs were required to relinquish in signing this agreement because the entire offering was shrouded in secrecy by Verizon. Before CLECs were even able to *see* the terms, Verizon required them to sign non-disclosure agreements and were told that the terms were non-negotiable. Because the process was considered a private commercial negotiation, neither state public utility commissions nor federal regulators were a part of the negotiation process, and CLECs signing the agreement relinquished all rights to take disputes to the commissions. Many CLECs signed these Wholesale Advantage agreements simply because they had no other choice. FSN refused to sign Verizon's proposed Wholesale Advantage agreement and, like some other CLECs, chose to transition its customers off UNE-P and move them to UNE-L, the very platform that is threatened by Verizon's current petition.

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19 See *Pennsylvania Public Utility Commission v. Verizon Pennsylvania Inc. Tariff No. 216 Revisions regarding Four Line Carve Out*, et. *al.*, Docket No. R-00049524, Opinion and Order entered April 15,2005. Copies of PaPUC orders can be found at http://www.puc.state.pa.us/general/search.aspx.

In litigation before the Pennsylvania Commonwealth Court appealing the PaPUC's actions to remove UNE-P, FSN was in the position of being able to publicly discuss the terms of Verizon's Wholesale Agreement due to the lapse of a non-disclosure agreement between the parties.[20] As discussed in that testimony, FSN could not sign Verizon's Wholesale Advantage agreement for the following reasons:

> 1. It required FSN to waive its right to Performance Metrics remedies and withdraw from proceedings at the PaPUC related to enforcing these rights;
>
> 2. It required FSN to waive any right to go to the PaPUC and seek assistance in any matters related to the offering;
>
> 3. Significant surcharges were added that resulted in rates that were more than double the rates suggested by the PaPUC;
>
> 4. It required FSN to use Verizon exclusively for 95% of its lines which would have foreclosed FSN's ability to build out its facility-based network because only 5% of new customers could utilize any new FSN facilities;
>
> 5. It included volume commitments for several years and, if these commitments were not attained, then FSN would still be required to pay for the services;

In five separate written proposals, FSN attempted to negotiate these and other terms with Verizon. However, Verizon's response was that the "material terms of the commercial agreement were nonnegotiable"[21]

There is every indication that CLECs can expect similar treatment if Verizon is granted the forbearance it seeks in its petitions. As pointed out by numerous commentors already,

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20 *See* Appendix A, excerpts from the transcript of the proceeding. *Pennsylvania Carriers Coalition, ATX Licensing, Inc., Full Service Computing Corp., trading as Full Service Network, Line Systems, Inc., and Remi Retail Communications, L.L.C., v. Pennsylvania Public Utility Commission, Verizon Pennsylvania Inc., and Verizon North,* No. 170 M.D. 2005, (Pa. Commw Ct. 2005). Ultimately, this appeal was discontinued by FSN and other appellants due to subsequent regulatory actions at the PaPUC.

21 *Id.* at 103-104.

nowhere in its petition does Verizon detail the terms it would offer in lieu of its current **loop** UNE offerings.[22] Indeed Qwest, when granted **regulatory** relief **in** Omaha, priced the elements *so* high **that** one CLEC **exited the market and** another one chose not to enter.[23]

B. At a minimum, if the Commission grants Verizon's petition it must ensure that significant regulatory oversight is implemented to prevent Verizon from leveraging market power to maximize its own profit.

Verizon's petition should **be denied** for all of the reasons already discussed. If, however, **the** Commission **considers granting** it, at the very least, the Commission must ensure. that regulatory **oversight** is maintained. As the true reality of Verizon's offering of Wholesale **Advantage clearly shows,** such oversight is absolutely necessary to ensure that **Verizon** does **not** exercise its dominant power to **extinguish** the remaining landline competitors. **FSN** supports granting **state** commissions this regulatory oversight **as** they **have the** local knowledge of their **markets and** have been **involved** in **ensuring** proper rates pursuant to federal law since **enactment** of **TA-96.**

FSN therefore **supports** the PaPUC's **position** that any grant of Verizon's petition must include a clear statement **that** "forbearance does not, and **should not** be read to, obviate any independent state authority **to *address*** matters within a state commission's jurisdiction."[24] Examples of state regulatory controls that could help **to** constrain Verizon from **abusing** its market power include: approval **of** the terms **of Verizon's wholesale offering,** making **the** terms of the offering available on **an** opt-in basis to similarly situated companies, and implementing **expedited procedures** to adjudicate disputes between Verizon and CLECs regarding the terms.

22 Comments **of** the City of Philadelphia dated March 5,2007 at 20.

23 Comments of Integra Telecom, Inc. dated March 5,2007 at *6*.

24 The Comment of the Pennsylvania Public Utility Commission, filed March 5,2007 **at 18.**

At a bare minimum, state regulatory protections such as this must be implemented in the event the Commission decides to grant Verizon's petition.

IV. CONCLUSION

Verizon's petition must be denied. To do anything else would simply guarantee the end of local landline competition. FSN, a Pennsylvania CLEC serving the Pittsburgh MSA, has made major investments of time, energy and money to bring local landline competition to its customers in spite of all the roadblocks that have been created by the dominant carrier, Verizon. Granting Verizon's petition would present a near insurmountable obstacle to FSN's ability to continue to provide a viable competitive alternative for local telephone service.

Respectfully submitted,

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Dated: April 18,2007

Counsel for Full Service Network

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

* * * * * * * * *

PENNSYLVANIA CAR'RIER'S COALITION, ATX LICENSING, INC., FULL SERVICE COMPUTING CORP., trading as FULL SERVICE NETWORK, LINE SYSTEMS, INC., and REMI RETAIL COMMUNICATIONS, L.L.C.,	No. 170 M.D. 2005
Petitioners	
~VS~	
PENNSYLVANIA PUBLIC UTILITY COMMISSION, VERIZON PENNSYLVANIA INC., and VERIZON NORTH, INC.,	
Respondents	

COPY

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HEARING

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BEFORE: BARRY F. FEUDALE,
Judge

HEARING: Thursday, April 28, 2005
1:37 p.m.

LOCATION: Courtroom Number One
Fifth Floor
Irvis Office Building
Harrisburg, PA 17120

Reporter: Michele J. Chilton

Q. Couldn't you have raised the rates that you charged to your customers to make up that amount?
A. The answer is no, we can't. We would have --- number one, we would have exceeded the rates in our approved tariffs with the Commission, so we would have had to have gone through Commission approval to raise the rates that high. Number two, we couldn't have raised the rates from a business perspective because then we would have been significantly above what Verizon charges the retail customers in Pennsylvania as well in order to break even.
Q. But didn't Verizon also offer you a long-term agreement that they characterized as a commercial agreement, I guess, in lieu of an interim agreement or in addition to?
A. Very similar, and it has ---.
Q. Well, did they offer that?
A. Yes.
Q. And why didn't you sign one of

those?

A. I haven't signed that because it has additional problems over and above what the interim commercial agreement has. Among those problems are, generally speaking, one, we waive the right to regulatory oversight ---.

ATTORNEY PETERSEN:

I'm going to object here at this point. To the extent --- Mr. Clearfield and I have spoken about this. There's a confidentiality agreement that controls certain portions of the negotiations that were entered into prior to April 7. To the extent he is referencing those negotiations, that's improper. That was evidence that was stricken out of your complaint when you amended it. And I would ask that the witness be directed to only speak, if he's going to speak at all, about developments after that confidentiality agreement. I'm sorry to interrupt, Your Honor.

BY ATTORNEY CLEARFIELD:

Q. Let me just make sure that's clear, Mr. Schwencke, in terms of describing the terms of this proposed commercial agreement, when did you receive the commercial agreement to which you're referring?

A. The agreement that I'm referring to I received this past Sunday, after the confidentiality agreement expired.

Q. And when did the confidentiality agreement expire?

A. I believe it was the first week in April.

Q. Now, you were mentioning the waiver of regulatory rights. Would you just make sure that's clear on the record?

A. There are five things that make it almost impossible to sign this piece of paper. Number one, we waive any right to go to the PUC to ask for help in matters. That includes the Pennsylvania Performance Metrics that the Pennsylvania Public Utility Commission has in place as a way of making sure that Verizon is playing fairly on the ball field. Those are waived.

Number two, there is a significant surcharge added in that commercial agreement. In fact, the surcharges are more than double what the FCC talked about for 2005. Another component to the surcharge --- or another component which causes an almost unbearable rate increase is that the agreement requires us to go back to pricing that was over a year old, that the PUC had in place in the early part of 2004. So between those surcharges that are more than double what the FCC's talking about, as well as going back to early 2004, there's a cost factor there that practically puts us out of business just by

itself. Those are three of the things that come to mind right now.
Q. Would there be any restrictions on you using other carriers during the term of the agreement?
A. Well, yes. The agreement would require us to use Verizon 95 percent exclusively. And that also precludes us from building out our facility-based network. So to the extent that we have a small switch in Pittsburgh and that there is time allotted that we could build out eventually a few years, if we signed that agreement, we would only be allowed to provision five percent of our new customers on our new facilities, which we would be paying for and installing. So it's a cap on what we can install and it preempts our growth plans in developing our own technology.
Q. Were there any type of pay or other requirements of that nature?
A. Well, there are volume commitments. There are volume

commitments for several years. There are certain volume commitments that you have to meet. And if certain levels aren't achieved, then you pay for --- you pay for the services whether you use them or not.

Q. And what's the term, the proposed term?

A. In the particular agreement which we spoke about, which was disclosed to me this past weekend, I believe that particular term was five years. And I want to try and keep my comments limited only to that agreement which came after the ---.

Q. That's fine. I think that's appropriate. May I ask, did you try to negotiate any of these terms out of the agreement?

A. Sure. Yes, we have. I've submitted five separate written proposals to Verizon on five different occasions. I was told yesterday on the phone by the Verizon negotiators that the material terms of the commercial agreement were nonnegotiable.

Q. What would happen to you or other CLECs if you sign one of these agreements, in your opinion?

A. I don't think we can sign it. We would be facing conditions that are almost impossible to survive.

ATTORNEY CLEARFIELD:

Your Honor, in the interest of time, I'll stop there and I'll make the witness available for Cross Examination.

JUDGE FEUDALE:

All right. Thank you. We'll modify somewhat the order of Cross Examination for obvious reasons. We'll allow Mr. Petersen to go. Then Mr. McClelland and then we'll let Ms. Martin go last.

ATTORNEY PETERSEM:

Thank you, Your Honor. I, too, will try to streamline

Remi --- the commercial agreement that Remi signed with Verizon required that they get out of our case and get out of all the cases.

ATTORNEY CLEARFIELD:

That's all I have.

JUDGE FEUDALE:

You had testified a while ago about your attempt to reach some type of an agreement, commercial agreement, ---

A. Yes, Your Honor.

JUDGE FEUDALE:

new commercial agreement with Verizon, and the communications that they went back and forth. I'm not sure if I understood correctly your one bit of testimony where you indicated that one of the condition precedents seemed to be that you would have to waive the wight to go to the PUC with any complaints. Maybe I misunderstood that. Would you clarify that?

A. Yes. There was an extensive provision in that latest agreement that would require us to get out of a lot of things that we're doing with the PUC, including the most important, which was the metric remedies that the Commission has established. The metric remedies are a self-operative way of making sure that Verizon's provision and wholesale services to us timely and when they don't provision the service timely, they're required to make payments to the CLEC and the industry as motivation. It's taken years to get those metric payments. It's an ongoing process. The Commission has meetings on a monthly basis on adjusting them. It's a very effective tool in keeping Verizon honest. And one of the things that that agreement would require that we do is waive all of those remedies.

JUDGE FEUDALE:

I'm not sure I understand completely metric remedies, but I thought you testified the right to go to the PUC with any complaints. Is that analogous with regard to your testimony about metric remedy?

A. Yes. Yes, it is. A lot of the problems that we would have with Verizon are in provisioning, arid they're dealt: with with metrics.

JUDGE FEUDALE:

All right. I have no other questions. Anything further?

ATTORNEY PETERSEN:

I have nothing from this witness.

JUDGE FEUDALE:

Thank you. You can step down.

ATTORNEY CLEARFIELD:

Thank you, Your Honor. Your Honor, our plan would be